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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/763,602	06/07/2001	Herwig Buchholz	MERCK 2213	8582

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MILLEN, WHITE, ZELANO & BRANIGAN, P.C.
2200 CLARENDON BLVD.
SUITE 1400
ARLINGTON, VA 22201

EXAMINER

FAY, ZOHREH A

ART UNIT

PAPER NUMBER

1614

DATE MAILED: 07/16/2002

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/763,602

Applicant(s)
Buchholz et al.

Examiner
Zohreh Fay

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1614



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on _____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 6 6) ☐ Other:

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Claims 1-16 are presented for examination.

Claims 5 and 6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim s 5 and 6 recites the limitation "other ingredients" in line 1. There is insufficient antecedent basis for this limitation in the claim.

Claim 11 provides for the use of the composition of claim 1 as a food supplement, but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claim 11 is rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

Claims 1- 11, 13 and 14 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1-10 are indefinite as to the term "containing" which indicates the presence of other active ingredients. Claim 11 is indefinite as to the expression "Use" which fails to set forth

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either a composition or method use intended. Claim 13 is indefinite in using improper Markush language. The term "including" is considered to be improper Markush language. Claim 14 is indefinite as to the phrase "e.g." which fails to clearly define the claimed conditions.

Claim 16 is a substantial duplicate of claim 1 which may be subject to rejection. See MPEP 706.03 (K).

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1 and 2 are rejected under 35 U.S.C. 102 (b) as being anticipated by Patent

Abstract of Japan 04099771. The Japanese abstract teaches the use of a mixture of ascorbic acid or derivatives and the claimed flavonoid glycosides.

Claims 1-6 are rejected under 35 U.S.C. 102 (b) as being anticipated by the Patent Abstract of Japan 7196523. The Japanese Abstract teaches the use of the claimed flavonoid glycosides in combination with ascorbic acid, minerals and vitamins.

Claim 12 is rejected under 35 U.S.C. 102 (b) as being anticipated by the Patent Abstract of Japan. ¹⁹⁹⁴⁰⁰¹²¹⁴³ The Japanese patent Abstract teaches the use of the claimed flavonoid glycosides in combination with vitamins C and ions for promoting the metabolic function of the body.

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Claim 15 is rejected under 35 U.S.C. 102 (b) as being anticipated by the Patent Abstract of Japan 039087. The Japanese Abstract teaches the use of the claimed flavonoid glycosides and ascorbic acid as antioxidants for the treatment of conditions associated with oxidative damage.

Claim 14 is rejected under 35 U.S.C. 102 (b) as being anticipated by Vrijesen et al.

Vrijesen et al. Teach the use of the claimed flavonoid glycosides in combination with ascorbic acid for the treatment of viral infection.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7-10 are rejected under 35 U.S.C. 103 as being unpatentable over the Patent

Abstract of Japan 04099771. The Japanese Abstract teaches the use of a mixture of the claimed flavonoid glycosides and ascorbic acid. See the entire abstract. The above reference differs from the claimed invention in the specific proportion or amounts. It would have been obvious to a person skilled in the art to determine the optimum amounts or proportions of a pharmaceutical formulation. One skilled in the art would have been motivated to employ the teachings of the above reference since it relates to the use of the claimed mixture. The determination of optimum proportion or amounts is considered to be within the skill of the artisan. Applicant has presented no evidence to establish the unexpected or unobvious nature of the claimed invention, and as such, claims 7-10 are properly rejected under 35 U.S.C. 103.

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3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Fay whose telephone number is (703) 308-4604.

ZOHREN FAY
PRIMARY EXAMINER
GROUP 1200



Z.F

July 13, 2002

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